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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 288

THOMAS BASS, ... Petitioner

vs.

COMMONWEALTH OF KENTUCKY, . Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APEALS OF KENTUCKY

BRIEF FOR PETITIONER

ZEB. A. STEWART,
Corbin, Kentucky,
Counsel for Petitioner.

Roberts Printing Co., Frankfort, Ky.

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(I) The jurisdiction of this Court.

A. The judgment sought to be reviewed is final in character.

B. A substantial federal question was properly presented in the court below.

C. The judgment below did not rest upon an adequate non-federal ground.

D. The petition for writ of certiorari was filed in this Court within the time authorized by law.

(II) The merits of the case.

A. The trial court erred to the prejudice of the substantial rights of petitioner in admitting the alleged confession in evidence to the jury in plain violation of Section 422.110 Kentucky Revised Statutes.

B. No pretense was made by the arresting officers to observe or comply with provisions of Sections 45, 46, 50 and

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51 of the Kentucky Code of Criminal Proceedure requiring that the accused upon being arrested be taken before a "committing magistrate" for examination of the charge.

C. The trial court erred to the prejudice of petitioner's substantial rights in failing to submit to the jury by an instruction for the jury's determination the vital question and issue of fact as to whether the alleged "confession" was voluntary or coerced, or involuntary, or whether it was or was not, obtained in violation of the Anti-sweating Statute (Section 422.110 Kentucky Revised Statutes).

D. Petitioner was denied the Constitutional right to trial by jury of a question and issue solely of fact.

E. The Court of Appeals of Kentucky erred in its holding that the trial judge himself, and not the jury, was the sole trier and arbitrer of the vital fact question as to whether the alleged "confession" was voluntary or coerced in violation of the statute, supra.

F. It was the duty of the trial court to instruct the jury on all the law applicable to the case concerning which there was any evidence, and to instruct the jury on the defendant's theory of the case.

Conclusion 21

TABLE OF CASES CITED

Ammons vs. State, 80 Miss. 592.

Ashcraft vs. State of Tennessee, 318 U. S. 608, 64 S. Ct. 921.

Bass vs. Commonwealth of Kentucky, 177 S. W. (2) 386, 296 Ky. 426.

Bennett vs. Commonwealth, 226 Ky. 529, 11 S. W. (2) 437 (and cases cited in Bennett opinion).

Burman vs. Commonwealth, 289 Ky. 312, 156 S. W. (2) 131.

Butler vs. Commonwealth, 284 Ky. 276, 144 S. W. (2) 505.

Chambers vs. Florida, 309 U. S. 227, 60 Sup. Ct. 472, 84 L. Ed. 716.

McClanahan vs. Commonwealth, 153 Ky. 412, 155 S. W. 1131.

McIntosh vs. Commonwealth, also reported as Commonwealth vs. McIntosh, 257 Ky. 465, 76 S. W. (2) 320.

McNabb vs. United States, 64 Sup. Ct. Rep. Advance, issue of March 15, 1943, P. 613, 617, and cases cited in McNabb Opinion.

STATUTES CITED

Constitution of the United States, Fifth, Sixth and Fourteenth Amendments.

Constitution of Kentucky, Sections Seven and Eleven, Bill of Rights.

Judicial Code, Section 237 (b) as amended, Title 28, Section 344 (b).

Kentucky Code of Criminal Proceedure, Sections 45, 46, 50, 51, 180, 225.

Kentucky Revised Statutes, Section 422.110 (Anti-sweating Act).

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 288

THOMAS BASS - - - - - - - - - *Petitioner,*

vs.

COMMONWEALTH OF KENTUCKY - - *Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR PETITIONER

OPINION BELOW

The Court of Appeals of Kentucky affirmed the judgment of the Criminal Division of the Circuit Court of Jefferson County, Kentucky, sentencing your petitioner to death by electrocution, in an opinion rendered January 21, 1944 (Petition for Rehearing denied April 25, 1944, without expression of opinion). The opinion is published in 177 Southwestern, Second Series, Page 386, 296 Kentucky Opinions, at Page 426. The original opinion is filed with and made part of the petition

herein, marked Exhibit "A" and is also copied into the Transcript of Record herein, Volume One (1) at Page 27.

JURISDICTION

The case is here on petition for writ of certiorari to review the judgment of the Court of Appeals of Kentucky which affirmed the judgment and sentence of conviction of the Jefferson Circuit Court. Petition for rehearing (printed copy of which is filed with the record in this court) was filed March 17, 1944, (R. Vol. 1, P. 36, typewritten Tr.) and overruled April 21, 1944 (R37) without expression of opinion. The petition for writ of certiorari was filed in this court July 24, 1944. The jurisdiction of this court rests upon Section 237-B of the Judicial Code as amended by Act of 1925 (U. S. C. Title 28, Section 344-B). Petitioner contends that the judgment sought to be reviewed was final, and necessarily decided adversely to petitioner substantial Federal questions which were properly presented by the record in briefs and argument on appeal, and for rehearing, and petitioner has exhausted his remedy in the courts of Kentucky, and that his petition for certiorari was filed in this court within the time authorized by law. He contends that he has been denied the equal protection and due process of law guaranteed him as a citizen of the United States, by the 5th, 6th and 14th Amendments to the Constitution of the United States, and in plain and open disregard of "those fundamental principles of liberty and justice guaranteed by the Federal Constitution, as well as by Section Eleven (11) of the Constitution of the Commonwealth of Kentucky, Section 422.110, Kentucky Revised Statutes (the Anti-Sweating Act of 1912 as amended) and by Sections 45,

46, 50, 51, and 180 of the Kentucky Code of Criminal Procedure.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

There is therefore involved the foregoing constitutional provisions of both Federal and State constitutions and particularly the construction of Section 422.110 of the Kentucky Revised Statutes known as the Anti-Sweating Act and its applicability to the evidence in this case with reference to the admissibility in evidence of the alleged "confession" admitted in evidence on the trial of your petitioner and the failure and of the trial court to submit to the jury for its determination the vital question of fact as to whether such alleged "confession" was or was not coerced and involuntary and obtained from the petitioner by force, intimidation, and threats of bodily injury and death at the hands of policemen and detectives out of court and while in custody and jail and before arraignment, and without being warned or informed that any thing he might say would be used in evidence against him at his trial, and without being given any opportunity to procure counsel—methods condemned in numerous decisions of this court and other Federal and State courts, and even in all previous decisions of the Kentucky Court of Appeals, and notably by this court in the recent cases of McNabb, et al. vs. United States, Advance Sup. Ct., issue of March 15, 1943, 318 U. S. 608; Asheraft vs. State of Tennessee, Advance Supt. Ct. Rep. issue of May 15, 1944, Case No. 391, Vol. 64, P. 921, and cases cited in the McNabb and Asheraft opinions, all of which authority, statutory and constitutional provisions are deemed to have an important bearing in

this case and which are set forth in the index herein, as well as in the petition for writ of certiorari herein sought and prayed.

STATEMENT OF THE CASE

Petitioner, a young, uneducated negro soldier of the U. S. Army, a native of South Carolina, stationed with the Medical Detachment at Bowman Field, near Louisville, Kentucky, was indicted by the Grand Jury of the Criminal Division of the Circuit Court of Jefferson County, Kentucky, on July 1, 1942, for the crime of willful murder alleged to have been committed about 5:30 P. M. June 17, 1942, in the city of Louisville, by striking and killing one John Brown (also a man of color), with a deadly weapon, to-wit: a hammer, for the purpose, as alleged by the Commonwealth, of robbery. It was the petitioners theory of the case, and he so testified at his trial, had on September 30, 1942, on the issue made by his plea of not guilty (Vol. 1, P. 5, typewritten Tr. Record) that Brown had, a few minutes before the killing invited Bass into his (Brown's) room in a rooming house at 926 South 11th street in the city of Louisville, and while seated on a bed in the room Brown, the deceased, while in an intoxicated condition, brought on the difficulty engendered by Brown's jealousy of Bass because of the latter's attentions or relations with a negro woman named Bessie Young, with whom Brown was infatuated (and with whom according to the evidence Brown, and perhaps Bass also, had had adulterous relations), that Brown reached for a pistol which he had on the bed (later found concealed in the bed) whereupon petitioner, in order to repel the assault, and in his own necessary self-defense, picked up a hammer and struck Brown, from which striking and wounding

Brown died in a hospital in Louisville about 2:30 A. M. on June 18, 1942 (Vol. 2 Tr. Ev., P. 3). See also Bass' evidence in his own behalf (Vol. 2 Tr. Ev., P. 28, 29). Omitting the statements in the "extorted" and alleged "confession" admitted in evidence to the jury by the trial court, there was no evidence on behalf of the Commonwealth to successfully refute the testimony of Bass to the effect that he struck Brown in self-defense and then only after Brown in his intoxicated condition had provoked and brought on the difficulty, and was in the act of reaching for the pistol with which to shoot Bass. There were no eye witnesses to the difficulty. Outside the alleged confession admitted in evidence it is doubtful if the evidence was sufficient to take the case to the jury. But with the alleged confession admitted in evidence by the trial court to go to the jury without any admonition, instruction, or discretion left to the jury to determine for itself as a question purely of fact as to the voluntary or involuntary nature thereof or the circumstances of its obtention by force and threats at the hands of policemen and detectives, the defendant stood admittedly guilty by his own evidence as set forth in the extorted confession, and the action of the trial court in arrogating to itself the determination of a voluntariness of the alleged confession really amounted to an instruction to the jury to find the defendant guilty. This alleged confession is found at Page 43, 45 Vol. 2 Typewritten Tr. of Evidence. The instructions which the court gave to the jury are found at Pages 10 to 17 of Vol. One (1) Typewritten Transcript of the Record herein, from which it will be noted that the jury were given no discretion or instruction to determine for itself as to whether the alleged confession was voluntary or involuntary and obtained in violation of the Statute cited (The Anti-Sweating Act). The case was argued

by counsel for the Commonwealth and defendant and submitted to the jury which, by its verdict (Vol. 1, Tr. Record, P. 5) found petitioner guilty, as charged in the indictment and fixing his punishment at death. In due season petitioner filed motion and grounds for new trial (Vol. 1, Tr. R., P. 7, 8) which were overruled (Vol. 1, Tr. R., P. 6) and exceptions saved. Judgment and sentence of death by electrocution was pronounced (Vol. 1, Tr. R. 6). In due season petitioner prosecuted his appeal granted by the trial court to the Court of Appeals of Kentucky, the court of last resort in the state. The case was briefed and argued by counsel for appellant and the Commonwealth, and the Court of Appeals by its opinion of January 21, 1944, reported in 177 S. W. (2) 386, affirmed the judgment. This opinion is found at Pages 27, 34, Vol. 1, Tr. R., and a copy thereof is attached to and made part of petition for writ of certiorari herein. On March 17, 1944, petitioner filed his printed petition in the Court of Appeals for rehearing (copy of which is attached to the record in this court) which petition for rehearing was overruled on April 21, 1944, without expression of opinion.

ASSIGNMENT OF ERRORS

1. The trial court erred to the prejudice of the substantial rights of petitioner in admitting in evidence and to go to the jury, the alleged "confession" of the defendant obtained from him by policemen and detectives by inquisitorial methods while in custody and confined in jail, by threats, extortion, and brutal Third Degree methods at Police Headquarters, without affording defendant the benefit of counsel and without any warning that any thing he might say would be used in evidence against him on his trial, in plain disregard

of the provisions of Kentucky Revised Statutes, Section 422.110, Supra, and without observing or making any attempt to observe the mandatory provisions of Sections 45, 46, 50 and 51 of the Kentucky Code of Criminal Proceedure (specifically set out on Pages 8, 9 of the petition for certiorari herein).

2. The trial court further erred to the prejudice of the substantial rights of petitioner in failing to instruct the jury in substance that if the jury believed from the evidence that the alleged "confession" was procured by methods prohibited by the Statute aforesaid, it should disregard same.

3. The trial court further erred to the prejudice of the substantial rights of petitioner in failing and refusing to permit the jury to determine for itself the vital question of fact at issue in the case, and the defendant's theory of the case, as to whether the alleged confession was or was not coerced in violation of the Statute, which denial and refusal amounted to a denial of trial by jury of a question of fact and violated the Sixth Amendment of the Constitution of the United States, and also violative of the Fifth and Fourteenth Amendments to the Federal Constitution, and due process, and Section Eleven (11) of the Constitution of the Commonwealth of Kentucky, providing for trial by an "imperial jury of the vicinage" of questions of fact in criminal cases, and this is true even assuming (as is not assumed) that the trial court did not err in admitting the alleged confession in evidence in the first instance.

4. The trial court erred further to the prejudice of the substantial rights of the defendant in its failure to instruct the jury as to the whole law of the case, and the defendant's theory of the case especially regarding the alleged confession, it being the duty of the trial

court whether so requested or not, to instruct the jury on the whole law applicable to the case on which there has been any evidence, and as held by the Court of Appeals in all previous decisions in construing Section 225 of the Kentucky Code of Criminal Proceedure, which in substance provides that the court shall "instruct the jury on the law applicable to the case, which shall always be given in writing."

5. The Court of Appeals also erred to the prejudice of the substantial rights of defendant, and its departure from its own well established and "settled maxims of law" and violation of due process and equal protection of the law, as it had held in all its previous decisions in applying and construing the "Anti-Sweating" Statute aforesaid, notably in the cases of Bennett vs. Commonwealth, 226 Ky. 529, 11 S. W. (2) 437; Commonwealth vs. McClanahan, 153 Ky. 412, 155 S. W. 1131; Lett vs. Commonwealth, 284 Ky. 267, 144 S. W. (2) 505; Butler vs. Commonwealth, 284 Ky. 276, 144 S. W. (2) 510, and McIntosh vs. Commonwealth, 257 Ky. 465, 76 S. W. (2) 320.

6. The failure of the trial court to submit to the jury for its determination the fact question as to the voluntariness or involuntariness of the alleged confession, was violative of Section Seven (7) of the Constitution and Bill of Rights of the Commonwealth of Kentucky, which declares, viz:

> "The ancient mode of trial by jury shall be held sacred and the right thereto remain inviolate."

7. Bass was the only witness in his own behalf; his unequivocal testimony (Vol. 2, P. 27, 28 R.) was, that he was threatened with death unless he would sign the confession admitting that he had killed Brown in

order to rob him, the policemen and detectives who extorted the confession from him and compelled him to sign it before a Notary Public testified that the same was voluntary. In the McIntosh case, supra, followed by all previous cases, the Kentucky Court of Appeals wrote:

> "The rule in this jurisdiction is that, when there is a conflict of evidence as to whether the confession was voluntarily made, or obtained by threat, intimidation or in any manner by duress, the question of fact should be submitted to the jury, leaving to their consideration the conflicting evidence and its effect in cases of belief or disbelief. Accordingly the court erred in eliminating the testimony from the consideration of the jury under an appropriate instruction."

8. The Anti-Sweating Statute (Kentucky Revised Statutes, Section 422.110) the violation of which is complained of as a question presented for consideration, reads as follows:

> (1) "No peace officer, or other person having lawful custody of any person charged with crime, shall attempt to obtain information from the accused concerning his connection with or knowledge of crime by plying him with questions, or extort information to be used against him on his trial by threats or other wrongful means, nor shall the person havving custody of the accused permit any other person to do so."
>
> (2) "A confession obtained by methods prohibited by subsection (1) is not admissible as evidence of guilt in any court."

THE ALLEGED CONFESSION

This alleged confession is copied into Volume Two (2), Pages 43-45 of the typewritten Transcript of Evidence with the record herein and consists of Three (3) single spaced typewritten sheets, which the policemen and detectives who extorted it from Bass testified was voluntarily made by the accused is altogether too perfect to convince any intelligent mind that it was voluntarily made. It bears every ear mark of careful, deliberate and studied phraseology and preparation, so carefully worded and phrased by masters of the "Third Degree" so as to avoid the appearance of questioning or "plying" the accused with questions. A mere reading thereof and an examination of its mechanical arrangement and an understanding of the circumstances surrounding its obtention will be sufficient to satisfy the judicial conscience versed in the methods of police inquisitors that the very language employed was not the language of an untutored negro youth from the "Deep South." An examination of the testimony of the policemen and detectives on direct and cross- examination at the trial will be sufficiently convincing as we submit, to show that the confession was extorted in violation of the Statute. Testimony of Policeman Joe Brummett (Tr. Ev., P. 13). This officer testified he brought Bass from jail to police headquarters the next day after the difficulty. He repeatedly testified that Bass "admitted" the crime. How could he make an admission without being plied with questions in violation of the Act, and for the purpose of "obtaining information from the accused concerning his connection with or knowledge of crime" and "while in custody" of these peace officers? We also invite attention to the evidence of policeman E. J. Kneis whose testimony

appears at Pages 14 to 20 of Volume 2 Tr. Ev. and introduced the alleged confession in evidence. This witness was asked (P. 19) "Do you mean to say that this wording here is the words of this defendant?"

"A. Just the way he told it." Testimony of Detective Oda Pate (Tr. Ev., P. 20, 24). "Q. I will ask you if that statement was prepared by Officer McDonald as given to him by this defendant Bass." "A. Yes." This officer also testified that this ignorant negro made the further voluntary statement, towit: "I have made this statement of my own free will without any promises or threats from any one and have read same before signing it and it is true." Was Bass "plied with questions" by these policemen and detectives? Detective Pate further testified (P. 21, 22) in answer to the following questions, viz: "Q. Has this man up to this minute. this defendant up to this minute ever mentioned that Brown had a pistol, did he tell you all that night that Brown had a pistol? "A. No sir, there was no mention made of a pistol at any time during the probably an *hour and a half of questioning and talking to Bass.*" "Q. (P. 22) Do you remember how that statement about Brown having this gun, how it got into this record?" "A. The gun?" "Q. Yes, that he handed the gun to Brown?" "A. I can't recall any particular statement pertaining to a gun. *They could have put that in it.*" All the culpable statements alleged to have been voluntarily made by Bass, or attributable to him not only "could," but they undoubtedly were, just as this policeman testified "put in" by these interrogating officers. Bass, testifying in his own behalf, testified regarding this alleged confession as follows (Tr. P. 27):

> "When they (policemen and detectives) got me over there (to police headquarters where he was taken from the jail) the fellows—two or three 'laws' over there—drawed a black jack on me and pistol and said they were going to kill me if I didn't say I hit him to rob him. They said, 'if you hit the man you robbed him; didn't you rob him' and drawed back and hit me with a black jack, and said, 'you must say you robbed him.' "

Policeman Brummett further testified for the Commonwealth (Tr. P. 38) as follows:

> "No sir, the only thing we said to him, Captain Pate was the one that told the defendant there is an old man down there that is beat up and robbed and is dead, and the best thing you could do is to tell what you know about it, *it is for your own good.*"

Policeman Kneis further testified (Tr. Ev. P. 39): "Yes sir, I was the one that got the confession."

From all the testimony and considering the circumstances can any unbiased and unprejudiced mind doubt that this alleged confession was extorted by methods condemned by Statute and the opinions of all courts both Federal and State?

ARGUMENT AND AUTHORITIES

In the McClanahan case, 153 Ky. 412, 155 S. W. 1131, cited in the foregoing, the Court of Appeals in interpreting this Anti-Sweating Statute, wrote as follows:

> It will be observed that the "sweating" prohibited by the act may be done by the mere

questioning of the person under arrest charged with the crime concerning his connection therewith or knowledge thereof, if it be done for the purpose of extorting from him (i. e., inducing an unwilling or involuntary giving of) information to be used against him on his trial for such alleged crime. In enacting this statute it was the purpose of the Legislature to strike a blow at the modern methods, less harsh than threats, intimidation or promises of benefits to be conferred, condemned by the common law, that are employed by detectives and arresting officers to obtain information from those suspected of guilt or implicated in crime. Just as three centuries ago the use of the rack and other tortures for compelling confession of guilt were abolished in England, there is now a tendency to do away with the "sweat box" and other like methods that are calculated to make such confessions other than spontaneous."

The Kentucky court then proceeded in the McClanahan opinion to quote from the case of Ammons vs. State, 80 Miss. 592, as follows:

"Such proceedings as this record discloses cannot be too strongly condemned. They violate every principle of law, reason, humanity, and personal right. They restore the barbarity of ancient and medieval methods. They obstruct instead of advance, the proper ascertainment of truth. It is far from the duty of an officer to extort confession by punishment. On the contrary he should warn his prisoner that every statement he may choose to make may be used against him on his trial." "It (the act) is neither unreasonable or oppressive in effect but was designed to protect the individual citizen in a right guaranteed to him by Section 11, Bill of Rights, Constitution, which declares 'he can-

not be compelled to give evidence against himself.' "

In the very recent case of Burnam vs. Commonwealth, 289 Ky. 312, 156 S. W. (2) 131, rendered October 31, 1941, the Kentucky Court of Appeals said in the opinion:

> "As there was a sharp conflict in the evidence as to whether appellant voluntarily confessed to this crime, or whether the confession was extorted from him, the trial judge correctly submitted to the jury the question under an appropriate instruction which in effect told them not to consider the written confession for any purpose if they believed from the evidence that it was obtained by mistreatment of appellant condemned in the statute."

Again, in the case of Bennett vs. Commonwealth, 226 Ky. 529, 11 S. W. (2) 437, a very similar case in point of fact to the case at bar, and from the same division of the Jefferson Circuit Court, and where a death sentence was also inflicted, the Kentucky Court of Appeals wrote in its opinion, viz:

> "Under the rule prevailing at present in this jurisdiction, the preliminary question affecting the competency of the written confession should have been submitted to the jury under an instruction in effect directing the jury not to consider the written confession for any purpose, if they should believe that it was procured by treatment condemned by the statute, supra, as construed in the opinions cited." The Court citing in support of this holding the previous cases of Gilliland vs. Commonwealth, 224 Ky. 453, 6 S. W. (2) 467, and Billings vs. Com., 223 Ky., 381, 3 S. W. (2) 771.

Your Honors in opinion reversing the Supreme Court of Florida in the case of Chambers vs. Florida, 309 U. S. 227, 60 Sup. Ct. 472, 84 L. Ed. 716, construing the Fourteenth Amendment in opinion by Justice Black, wrote in the opinion as follows:

> "The process of repeated questioning took place in the jailer's quarters on the fourth floor of the jail. During the week following their arrests and until their confessions were finally acceptable to the State's Atorney, in the early dawn of Sunday May 21st, the petitioners and their fellow prisoners were led, one at a time, from their cells to the questioning room, quizzed and returned to their cells to await another turn. So far as appears, the prisoners were at no time during the week permitted to see or confer with counsel or a single friend or relative. When carried singly from his cell and subjected to questioning, each found himself, a single prisoner, surrounded in a fourth floor jail room by four to ten men, the county sheriff, his deputies, a convict guard, and other white officers and citizens of the community."

(Continuing the opinion) "The scope and operation of the Fourteenth Amendment have been fruitful sources of controversy in our constitutional history. However, in view of its historical setting, and the wrongs which called it into being, the process provision of the Fourteenth Amendment, just as that in the Fifth, has led few to doubt that it was intended to guarantee procedural standards adequate and appropirate, then and thereafter, to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority. The determination to preserve an accused's rights to proceedural due process sprang in a large part from knowledge of the

historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes. The testimony of centuries, in governments of varying kinds over populations of different races and beliefs, stood as proof that physical and mental torture and coercion had brought about the tragically unjust sacrifices of some who were the noblest and most useful of their generations."

"The rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment of the helpless or unpopular had in their wake of mutilated bodies and shattered minds along the way of the cross, the guillotine, the stake and the hangman's noose. And they who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the friendless and powerless." (Continuing the Chambers opinion.)

"Under our Constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered or because they are non-conforming victims of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this court than that of translating into living law and maintaining this Constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution, of whatever race, creed or persuasion."

Similar Constitutional questions involving the use in evidence of "sweated" and extorted confessions under like or similar circumstances as appears here, were involved and considered by this Honorable Court in the case of McNabb vs. United States, in an opinion by Mr. Justice Frankfurter, handed down March 1, 1943, Vol. 63 Sup. Ct. Reporter, P. 608, 617, Advance Issue No. 9 of March 15, 1943, wherein was involved rights guaranteed by the Fifth and Fourteenth Amendments, in which opinion reversing the McNabb convictions an extended list of authority and precedent of the Supreme and other courts is cited in support of the McNabb holding, including the Chambers case. We quote below pertinent parts of the McNabb opinion, towit:

> "(1) Concedely, the admissions made by Freeman, Raymond and Benjiman constituted the crux of the Government's case against them, and the convictions cannot stand if such evidence be excluded. Accordingly, the question for our decision is whether these incriminating statements, made under the circumstances we have summarized, were properly admitted. Relying upon the guarantees of the Fifth Amendment that no person 'shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberay, or property, without due process of law,' the petitioners contend that the Constitution itself forbade the use of this evidence against them. The Government counters by urging that the Constitution prescribes only 'involuntary' confessions, and that judged by appropriate criteria of 'voluntariness' the petitioners admissions were voluntary and hence admissible."
>
> "(2) It is true, as the petitioners assert, that a conviction in the federal courts, the foundation of which is evidence obtained in disregard

of liberties deemed fundamental by the Constitution, cannot stand." (Citing many authorities.)

(The opinion continues) "And this court has, on Constitutional grounds, set aside convictions, both in federal and state courts, which were based on confessions 'secured by protracted and repeated questioning of ignorant and untutored persons in whose minds the power of officers was greatly magnified." (Citing Lisenba vs. California, 314 U. S. 219, 240, 62 Sup. Ct. 280, 291, 86 L. Ed. 166, and divers other cases.)

"(3-5) In the view we take of the case, however, it becomes unnecessary to reach the Constitutional issue pressed upon us. For, while the power of this Court to unto convictions in state courts is limited to the enforcement of those 'fundamental principles of liberty and justice' (citing Hebert vs. Louisiana, 272 U. S. 312, 316, 47 Sup. Ct. 103, 104, 71 L. Ed. 270, 48 A. L. R. 1102.

It appears from the McNabb opinion that there was involved a Federal Statute which required the arresting officers of the government to take the accused before a "Committing Officer" but which was not done, just as it was not done in the case at bar, and as required by the Kentucky Code of Criminal Proceedure by Sections 45, 46 thereof, and by Sections 50 and 51 of the Code cited in the foregoing. In considering such failure in the McNabb case, the opinion (Parts 8, 9,) recites:

"The purpose of this impressively pervasive requirement of criminal proceedure is plain. A democratic society in which respect for the dignity of all men is central, naturally guards

against the misuse of the law enforcement process. Zeal in tracking down crime is not itself an assurance of soberness of judgment. Disinteredness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. Legislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard—not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. For this proceedural requirement checks resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime. It reflects not a sentimental but a sturdy view of law enforcement. It outlaws easy but self-defeating ways in which brutality is substituted for brains as an instrument of crime detection. A statute carrying such purposes is expressive of a general legislative policy to which courts should not be heedless when appropriate situations call for its application."

We observe that the foot note to Part 7 of this McNabb opinion cites as authority Sections 45, 46, supra, of the Kentucky Code of Criminal Proceedure.

A still more recent case is that of Ashcraft et al. vs. State of Tennessee, decided May 1, 1944, No. 391, reported in Advance issue of Supreme Court Reporter of May 15, 1944, at Page 921, Vol. 64, No. 19, wherein the same rule is announced regarding coerced confessions as in the McNabb, Chambers, and other cases cited herein as well as in the foregoing opinions. A distinction to be noted between the Ashcraft case and the case at bar is, that the trial court in the Ashcraft case permitted the trial jury by appropriate instruction to pass on the fact question as to whether the confession was voluntary or coerced or involuntary, whereas in the case at bar the trial court did not by any instruction or admonition allow the jury to decide this vital fact question. But notwithstanding in the Ashcraft case the jury determined this fact question adversely to Ashcraft and Ware, the convictions were reversed by your Honors. It is deemed sufficient to quote syllabus No. 4 of the Ashcraft opinion, towit:

> "The Federal Constitution stands as a bar against the conviction of any individual in an American court by means of a coerced confession."

Many precedents are cited in the footnotes of the Ashcraft opinion from this and many other courts announcing the established principles of law here contended for. Another distinction that may be noted is that Ashcraft's conviction was reversed, although, as appears from the opinion he was an intelligent white man and an experienced and successful business man, whereas the petitioner here is an uneducated young negro.

CONCLUSION

It is therefore submitted that the writ of cetiorari prayed in the petition should issue, and the judgment reversed, and case remanded with directions to be proceeded with according to law.

Respectfully submitted,

ZEB. A. STEWART,
Counsel for Petitioner.

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